NOT FOR PUBLICATION

DISTRICT COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

UNITED STATES OF AMERICA, for the use and benefit of ENVIR-O-MAN, INC., CHARTER HOLDING, INC. a/k/a CHARTER HOLDING LEASE, ABC READY MIX INC. a/k/ TREACO LEASING,	
Plaintiffs,	**CIVIL NO. 1998/143**
v.	
THE MOUNTBATTEN SURETY COMPANY, INC. and HAP CONSTRUCTION, INC.,	
Defendants	

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ORDER GRANTING PLAINTIFF'S MOTION TO PERMIT VIDEO TRIAL DEPOSITION OF FARRELL KILLINGSWORTH

THIS MATTER came for consideration on Plaintiffs' Motion to Permit a Video Trial Deposition of Farrell Killingsworth. HAP filed opposition to the motion that was joined by Mountbatten. Plaintiffs did not further reply.

In support of their motion, Plaintiffs assert that pretrial discovery has revealed "that Farrell Killingsworth is a foundational witness for the Plaintiffs in this matter."

Plaintiffs do not indicate whether Mr. Killingsworth is a principal in the Plaintiffs' corporations, a manager or employee thereof, or otherwise. HAP concurs as to Killingsworth's importance, noting that "Mr. Killingsworth is the only person in the world, apparently, who can testify as to the timing, scope, and content of the alleged oral contracts at issue." HAP suggests that Killingsworth is a principal of Plaintiffs by stating, "Mr. Killingsworth elected to bring this case in this jurisdiction."

Plaintiffs argue that Mr. Killingsworth has medical problems that would prevent overnight stay by him in St. Croix and thus obviate his personal appearance at trial. HAP disputes the bona fides of the medical information provided in support of Mr. Killingsworth's motion and cites Fed. R. Civ. P. 43(a) and F.R.E. 801 and 804(a)(4) regarding his purported "unavailablity."

The Federal Rules of Civil Procedure makes no distinction for use of a deposition at trial between one taken for discovery purposes and one taken for use at trial. *In Re: Tutu Wells Contamination Litigation*, 189 F.R.D. 153, 157 (D.V.I. 1999), citing *Tatman v. Collins*, 938 F.2d 509, 510 (4th Cir. 1991); *United States v. IBM Corp.*, 90 F.R.D. 377, 381 (S.D.N.Y. 1981).

"The use of a deposition at trial is governed by Fed. R.

Civ. 32(a)(3) which provides in pertinent part:

> The deposition of a witness whether or not a party, may be used by any party for any purpose if the court finds ...(B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition."

Glaverbel Societe Anonyme and Fosbel, Inc. v. Northlake Marketing and Supply, Inc. et al. 139 F.R.D. 368, 369 (N.D. Ind. 1991) [allowing Plaintiff to take trial deposition of five of their own employees]. See also *United States v. International Business Machines Corp.*, 90 F.R.D. 377, 380 (S.D. N.Y. 1981); *Stewart v. Meyers*, 353 F.2d 691, 696 (7th Cir. 1965). (A party may use his own deposition at trial under certain circumstances); *Houser v. Snap-on Tools Corp.*, 202 F.Supp. 181, 189 (D.Md. 1962). ("However procuring absence and doing nothing to facilitate presence are quite difference things"); *Richmond v. Brooks*, 227 F.2d 490, 492 (2nd Cir. 1955). (Plaintiff had right to offer her deposition as her sole proof at trial under rule providing that the deposition of a witness, whether or not a party may be used for any purpose if the witness is more than 100 miles from the place of trial).

In Sinkiwich, Inc. v. Texaco Refining and Marketing, Inc., 120 F.R.D. 540 (M.D. Ga. 1988), the court allowed Defendant to depose its own employee who made the management decision that resulted in

the lawsuit because such employee was more than 100 miles from place of trial. The court found that such employee must be viewed as a "managing agent" under Rule 32 of Federal Rules of Civil Procedure and "...is thus viewed as a party and could be deposed by the plaintiff by notice specifying the place of taking 'subject [only] to the power of this court to grant a Rule 26(c)(2) protective order designating a different place'" citing Wright and Miller, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2112.

That principle is more cogent when it is Plaintiff who seeks to depose such managing agent.

> As a normal rule, plaintiff will be required to make himself or herself available for examination in the district in which suit was brought. Since plaintiff has selected the forum, he or she will not be heard to complain about having to appear there for a deposition.

Wright, Miller, and Marcus, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2d § 2112. Further however,

> But this is at best a general rule and is not adhered to if Plaintiffs can show good cause for not being required to come to the district where the action is pending. For example, the examination has been ordered held elsewhere when Plaintiff was physically and financially unable to come to the forum...

Accordingly, the Court need not consider Mr. Killingsworth's asserted ailment with regard to Plaintiffs' request to take his trial deposition. Mr. Killingsworth is apparently located in Miami, Florida which is more than 100 miles from St. Croix. Fed.

R. Civ. P. 32(a)(3)(B) clearly allows such procedure. Pursuant to Fed. R. Civ. P. 26(c)(2), the Court may set the place of deposition and may consider Mr. Killingsworth's medical condition with regard thereto.

Plaintiffs' assertions are that Mr. Killingsworth has poor circulation and extreme difficulty in walking and that he has sleep apnea which necessitates a breathing apparatus dependent upon a reliable electric power supply. HAP has challenged the medical documentation provided by Plaintiffs in support of such assertions suggesting that they may be forged and false[1] and that they are not current and are inherently unreliable.

Without deciding the validity of Mr. Killingsworth's claimed impairments, the court finds that there are conditions of contest that will encompass all interests. In particular, Mr. Killingsworth's deposition may be scheduled in St. Croix so that he could arrive early in St. Croix and return to Florida on the same day. If in arranging the schedule the parties determine that there would be insufficient time to complete such deposition, the schedule must allow Mr. Killingsworth's repair to Puerto Rico for

1. Plaintiffs have not filed a response to HAP's opposition and accordingly have not defended such criticism. If HAP can later demonstrate such fraudulent conduct appropriate other sanctions may be considered.

overnight stay (with more reliable electric power) and return to St. Croix the next day for completion of the deposition.

It is not clear from the documents submitted whether Mr. Killingsworth has previously been deposed in this matter. In any event, the Order dated November 1, 2000 allowed Defendants to re-depose Plaintiffs' corporate and other witnesses with regard to Plaintiffs' new allegations.

Accordingly, it is hereby;

ORDERED as follows:

1. Plaintiffs' Motion to Permit the Video Trial Deposition of Farrell Killingsworth is GRANTED.
2. Immediately prior to taking such trial deposition, Defendants may conduct a discovery deposition of Mr. Killingsworth. If his deposition has previously been taken any re-deposition shall be as provided in the November 1, 2000 Order.
3. Unless otherwise agreed by the parties, such depositions of Mr. Killingsworth shall be taken in St. Croix, U.S. Virgin Islands and shall be scheduled to either allow Mr. Killingsworth's same day departure to Florida or overnight in Puerto Rico as discussed above.

ENTER:

Dated: November 13, 2000

_____
JEFFREY L. RESNICK
U.S. MAGISTRATE JUDGE

ATTEST:
ORINN ARNOLD
Clerk of Court

By:_____
Deputy Clerk